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FILED
DEC 29 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 506

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 97-51

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant

JURISDICTIONAL STATEMENT

Pursuant to Rule 12 of the Revised Rules of the Supreme Court of the United States, the plaintiff appellant respectfully presents the following statement disclosing the basis upon which it submits that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above entitled case.

A. Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court to review by direct appeal the final decree entered in this case by the Court below is contained in U. S. C. A. Title 28, Section 1253 which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit,

> or proceeding required by an Act of Congress to be heard and determined by a District Court of 3 Judges."

This is an action to enjoin orders of the Interstate Commerce Commission and is, therefore, a case which under Sections 2284 and 2325 of this title may be heard and determined only by a District Court of 3 Judges. *U. S.* v. *Capital Traction Co.*, 338 U. S. 286.

As to such actions Section 2101 (b) of this title, after referring to appeals from decisions holding an Act of Congress unconstitutional, provides:

> "Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a District Court in any civil action suit or proceeding, shall be taken within 30 days from the judgment, order or decree, appealed from, if interlocutory, and within 60 days if final."

B. Opinion Below and Date of Final Decree To Be Reviewed

The opinion of the District Court for the District of New Jersey was filed on August 28, 1951. The Opinion, Findings of Fact and Conclusions of Law are reported in *CRR of NJ* v. *U. S.*, 99 Fed. Supp. 564, and a copy is attached hereto as Appendix A.

The final decree sought to be reviewed was entered on October 23, 1951. The Petition for Appeal was presented and allowed and the Assignment of Errors was filed on November 5, 1951.

C. Questions Presented

1) Whether the Commission's orders, denying any relief from non-compensatory divisions of joint rates which the Commission itself had prescribed, were not based on an erroneous construction of Sections 1 (4), 15 (6), and 15A (2) of the Interstate Commerce Act?

2) Whether the Commission's orders were not also based on an erroneous construction of Sections 1 (6) and 15 (1) of said Act?

3) Whether said orders do not involve a taking of appellant's property in violation of the Fifth Amendment?

4) Whether the District Court did not err in failing to reach an "independent judgment" on the fact and the law issues raised by the complaint of confiscation?

5) Whether the District Court did not fail to comply with the requirements of the Administrative Procedure Act?[1]

D. The Statutes of the United States Which Are Involved

The statute chiefly involved is the Interstate Commerce Act, Title 49, U. S. C. A., Sections 1(4), 1(6), 3(4), 15(1), 15(6), 15a(2), and the note preceding Section 1, which are reproduced as Appendix B hereto.

E. Nature of the Case and the Rulings of the Commission and the District Court

The matter in controversy is the lawfulness, since July 3, 1944, of the New York harbor terminal division received by the plaintiff and the other harbor railroads and allowed by the defendant railroads out of the joint freight rates applicable to and from New York.

The harbor division was originally established in 1892 at 3¢ per hundred pounds by agreement of the railroads participating in the joint rates applicable to and from New York. At that time the joint rates were made by the railroads themselves under stress of unregulated competition.

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[1] While all of the errors specified in the Assignment of Errors are relied upon, many of them are factual and cumulative. The broad questions above stated set forth the major legal issues.

The division of the joint rates was purely a matter of private bargaining between the interested carriers. The result was that the rates applying between points in Official Territory [2] bore no definable relation to each other or to the cost of the service performed under them. Congress in 1920 in enacting a fundamental change in railroad regulation determined that the rates should be systematized on a territorial and group basis so that the carriers as a whole in each territory would earn, "in the aggregate", all costs plus a fair return and that the division of joint rates, as well as the rates themselves, was affected with a public interest and should thereafter be subject to regulation by the Commission in accordance with the standard specified in Section 15(6) of the Act.

In the *New York Harbor Case*, 47 I. C. C. 643 (1917), which is now relied upon by defendants, the Commission found that the New York rates in effect at the time of that decision did not include the full cost of the harbor service, although as the Commission has repeatedly ruled, under the language of the rate tariffs, the joint rates payable by the public to and from New York legally covered the full harbor service, as well as the line-haul service. (*Lighterage and Storage Regulations at New York*, 35 I. C. C. 47 at 52; *New York Harbor Case*, 47 I. C. C. 643; *Fruit and Vegetables to Duane Street*, 66 I. C. C. 135; *Lighterage Cases*, 203 I. C. C. 481 at 511, 513; *State of New Jersey* v. *B&O R. Co. et al.*, 245 I. C. C. 581 at 588, 590; *Unloading Lumber at New York*, 256 I. C. C. 463 at 468; *Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673).

Under the new congressional policy, adopted in 1920, designed to assure to the public adequate and stable rail-

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[2] Official Territory is the area bounded generally by the Potomac and Ohio Rivers on the south, the Mississippi River on the west, the Canadian Border on the north, and the Atlantic Ocean on the east.

road service throughout the country, the Commission since 1920, acting under Section 15a(2), has completely revised the rates generally by prescribing in each rate territory a uniform rate structure reflecting cost plus some return, based on relative mileage between all points in the several rate districts. Since by far the greater number of commodities moved under class rates, the Commission began the revision in Official Territory by its comprehensive investigation in *The Eastern Class Rate Case*, 164 I. C. C. 314 (1930).

In that case it prescribed a wholly new class rate structure based on mileage scales in which, as a general rule, it measured and prescribed joint class rates to and from New York by precisely the same formula as it fixed the rates to and from stations or group of stations throughout Official Territory, except that since the flat New York rates apply to and from a large group of stations in New Jersey as well as New York, many of which required only rail service, while many others also required marine service, in constructing the rates to and from the New York rate group it was provided that, in addition to the actual miles to the railhead at Jersey City or Hoboken, ten constructive miles should be added. The Commission expressly stated that this ten mile addition was not "devised with the object of arriving at any particular rate for any particular distance or between any given points", but "to provide a structure of rates which will be reasonble for average conditions" (164 I. C. C. at 395). In other words, since the New York rate group included many interior stations in New Jersey where no harbor service was performed, the Commission in constructing the rates to and from the New York group included a mileage arbitrary in addition to the actual mileage to the railhead, thus taking care of all the harbor costs on shipments that were lightered or floated by distributing these

costs between all points in the group whether or not such points required the harbor service. Following the Eastern Class Rate Case, the Commission, in over 200 other rate cases, prescribed commodity rates on a similar mileage scale basis on particular commodities moving in large volume, such as iron and steel, copper, tin, lead, zinc, cement, petroleum products, ore, paper, furniture, fertilizer, scrap iron, salt, sugar, sulphur, lime, slag, brick, etc., etc.; (see Exhibit 78), in which it similarly treated the rates to and from the New York rate group as part of a consistent territorial rate structure based on relative mileage as between all points in Official Territory.

In addition to the many rate cases referred to above in which the Commission, since 1920, has revised the rate structure consistently with the requirements of Section 15a(2) of the Act, the Commission since 1920 has conducted the following periodic revenue proceedings,—Ex Parte 74, 58 I. C. C. 220 (1920); Reduced Rates 68 I. C. C. 676 (1922); Ex Parte 123, 226 I. C. C. 41-746 (1938), Ex Parte 162, 266 I. C. C. 537 (1947), Ex Parte 166, 270 I. C. C. 403 (1948), Ex Parte 168, 276 I. C. C. 9 (1949), and Ex Parte 175, 280 I. C. C. 179 (1951), in which the Commission, without considering individual rates, has authorized general percentage increases in the rate level as a whole which it deemed necessary in compliance with Section 15a(2) to assure to the railroads aggregate revenues that would cover all costs plus a fair return on their investment in all their services including lighterage and carfloatage in New York Harbor.

The Examiners who heard the evidence that was submitted to the Commission and the Commission in its first report, in this case, 272 I. C. C. 529, were very familiar with the above circumstances and with the decision of this Court in *B. & O. R. R. Co.* v. *U. S.*, 298 U. S. 349 (1936), which construed Sections 1(4), 15(6) and 15a(2) as requiring that,

in a divisions case, the Commission, in administering Section 15(6) should proceed on the presumption that the rates to be divided were reasonable. Based on this construction of the statute, the two Examiners who heard all the testimony and the Commission in its first report found that the harbor divisions being received by each of the harbor roads were "unjust, unreasonable and inequitable" and should be increased to a fair basis. Notwithstanding the failure of the defendants to offer any evidence as to the cost of the road-haul service they performed, the Commission in its first report concluded that on the record before it, and in harmony with the standard prescribed in Section 15(6), it could and should prescribe a fair harbor allowance on the following basis:

> "The Jersey Central is entitled to reasonable compensation for its harbor service, as part of the total service performed by all of the carriers under the joint rate, the amount of the allowance to be reasonably related to the portion of the rate left for distribution among the line-haul carriers. We have accepted, as reliable, the data from which complainant computes the cost of the Jersey Central's harbor service. If the harbor allowance to that carrier, based on a correct use of those data, is reasonable, and is deducted from a joint rate that is reasonable, the remainder of the joint rate must be viewed as reasonable. There is no showing, or contention, upon this record that the joint rates, in effect at the time of the hearing herein, were not reasonably compensatory. Some of them were prescribed by us. All of them have been substantially increased since the hearing, as hereinafter shown. We shall therefore proceed to a determination of reasonable allowances for the float and lighterage services performed by the Jersey Central, and of the rate levels from which the full amounts found reasonable as average allowances may properly be deducted" (272 I. C. C. at 584).

The Commission then prescribed harbor divisions which, as will be shown hereafter, were substantially below cost but which the Commission in the light of all of the evidence deemed to be "fair, just, and equitable."

The Commission in the report and orders now complained of, as the result of clear errors of law, set aside its original order and dismissed the complaint, leaving appellant without any relief.

The author of the Commission's second report (276 I. C. C. 655) and the Commissioners who approved it, seem to have given controlling weight to the rates that were in effect prior to 1917 as described in the New York Harbor Case, and to have given no weight whatever either to the rate structure prescribed since 1920, to the findings of fact in the Commission's first report, or to the construction of the Act which this court has deemed necessary to make it workable.

As To Sections 1(4), 15(6), and 15a(2)

In complete disregard of the rule announced by this Court in the B&O case (supra) that, in divisions cases, the rates are not in issue but are presumed to be reasonable, the Commission in its second report premised its order of dismissal on a finding

> "that the great bulk of the New York rates, the divisions of which are here in issue, do not include the full cost of the lighterage and floatage services in New York Harbor which are performed under such rates."

and concluded that

> "the joint rates, or at least most of them, do not include the full cost of the harbor services, and therefore, for the purposes of this proceeding, must be assumed to be below a maximum reasonable level." (276 I. C. C. at 658)

The comment of the District Court on plaintiff's contention, that this Court's construction of the statute in the *B&O Case* was disregarded by the Commission, is the following excerpt from the Court's opinion:

> "Under this caption it is first argued that, since the primary issue in this litigation is harbor co. s and not the over-all joint rates, the latter must be presumed to be reasonable under Baltimore & Ohio R. R. Co. v. United States, 298 U. S. 349, and that the Commission erred in its construction of Section 15(6) of the Act by ignoring such presumption.
>
> "The Jersey Central by means of this litigation is endeavoring to obtain an increase in its harbor allowance out of the joint New York rates. The Commission at no time has objected to the Central making harbor costs the primary issue. In a strictly divisions case, as said in Baltimore & Ohio R. R. Co. v. United States, supra at 357, '* * * the Commission is governed by Sections 1(4), 15(6), 15a(2); it is not required or authorized to investigate or determine whether the joint rates are reasonable or confiscatory. * * * The purpose of the provisions just cited is to empower and require the commission to make divisions that colloquially may be said to be fair.' We need not concern ourselves with the question of whether the unusual factual situation present in this matter would permit it to be classified as within the group governed by the B. & O. decision because here the Commission did not hold that the New York rates were not reasonable. Such a ruling was not important to its decision and was not contended for by any of the defendants. The Commission did say that since '* * * the joint rates, or at least most of them, do not include the full cost of the harbor services, * * * for the purposes of this proceeding, [they] must be assumed to be below a *maximum* reasonable level.' (Emphasis supplied). This is a far cry from plaintiff's statement that the Commission '* * * necessarily determined that the New York rates which it had prescribed, were not compen-

satory, • • •.' All the Commission did was to find that since one division of presumably reasonable joint rates was below cost, the joint rates themselves for the purposes of this action would be assumed to be below a '*maximum* reasonable level.' (Emphasis supplied). The Jersey Central, itself, in its already referred to motion to dismiss defendants' petition for reargument and reconsideration after the filing of the first report, would seem to be in agreement with this thought of the Commission. Speaking of those specific New York joint rates, it there said, '*There is, of course, a wide range between minimum reasonable rates and maximum reasonable rates* and no one has attempted to say where in that range these rates come.'" (Emphasis supplied.) (Pages 35-6),[3] 99 Fed. Supp. 564 at 570.

It should be noted that the Court erroneously attributes to plaintiff the contention that "the primary issue in this litigation is harbor costs" and adds that "the Commission at no time has objected to the Central making harbor costs the primary issue." This discloses a serious misapprehension. Plaintiff's consistent position has been that the primary issue under Section 1(4) and 15(6) is, of course, not harbor costs per se, but the lawfulness of the present harbor divisions as tested by the standard defined in Sections 1(4), 1(6), 15(1), and 15(6) in which relative cost is only one of several factors to each of which we believe the Commission in its first report gave appropriate weight.

It is submitted that the District Court gave no indication that it recognized the controlling effect of the construction placed by this Court on Sections 15(6) and 15a(2) in the B&O Case but on the contrary discloses a belief that the doctrine of the B&O Case is inapplicable to the present case "because here (the Court says) the Commission did not hold that the New York rates were not reasonable."

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[3] Page references are to the District Court's Opinion attached hereto as Appendix A.

A most anomalous feature of this litigation is that, although the defendant (The U. S. of A.) admits in its answer that the present New York rates "to a large extent have been prescribed by the Commission as maximum reasonable group rates, as such rates are defined by plaintiff," yet the Commission based its order of dismissal on the premise that the rates "do not include the full cost of the harbor service and, therefore, for the purpose of this proceeding must be assumed to be below a maximum, reasonable level." The Commission's assumption respecting the rates rests on railroad defendant's admission and insistence that the allowance has been below cost since 1915, (R. 584-5, 597), yet the apparent reason for the District Court's order of affirmance is plaintiff's alleged failure to prove that the harbor allowance is below cost. Rates prescribed in rate cases and periodically adjusted in revenue cases by the Commission in compliance with Section 15a(2) are by statutory definition reasonable and, therefore, must be presumed to cover the cost, plus some return on all services performed under them. How can it, in reason, be assumed that rates fixed by the Commission as maximum, or even minimum reasonable, rates are below the statutory standard that controlled the Commission in prescribing them? The New York group rates either do, or do not, cover the full cost plus some return on all service, including the harbor service, performed under them. If they do not cover such cost then they are manifestly not even minimum reasonable rates (*See U. S.* v. *C. M. & St. P. Co. et al.*, 294 U. S. 499 at 506) and are beyond the Commission's power to prescribe. If they do cover all costs then the Commission's assumption that they do not cover the full cost of the harbor service was manifestly unsound and arbitrary.

It is submitted that the Commission and the District Court erred in disregarding the construction of the Act announced by this court in the B&O Case, and heretofore consistently followed by the Commission in divisions cases.

As to Sections 1(6) and 15(1)

Another purely law question presented by this appeal is the construction of the word "practice" as used in Section 1(6) of the Interstate Commerce Act.

The complaint before the Commission charged that the deliberate policy of the defendants, including the other New York Harbor roads in maintaining, over a long period of years, a harbor division on a non-compensatory level was a "practice" in violation of Section 1 (6) from which the Commission should grant relief under Section 15(1). Defendants argued that this Court's decision in *B&O RR Co.* v. *U. S.*, 277 U. S. 291 necessarily means that a terminal division of a joint rate, even in a case like this where the aggrieved party complains of a deliberate course of action by *competing carriers*, cannot be construed as a device for implementing an unlawful "practice" within the meaning of Section 1(6). The Commission in its first report held that it was not necessary for it to pass on this law question in order to accord the plaintiff, under Sections 1(4) and 15(6), all the relief it sought. In its second report the Commission disposed of this issue as follows:

> "Even if the refusal of the other harbor lines to increase their allowances for harbor service so as to equal, or more nearly equal, their excess costs of that service could be regarded as a 'practice' under Section 1(6) of the Act, as claimed by complainant, nevertheless under the decision in *B&O v. U. S.*, 277 U. S. 291, before we could find the 'practice' unjust or unreasonable as alleged in the complaint, the same kind of evidence would be required as is necessary in the consideration of an issue under Section 1(4) and 15(6) * * *" (276 ICC at 661.)

We submit that the fair meaning of this is (1) that the Commission reached no conclusion on the law question as to whether the course of action complained of was a "practice" within the meaning of Section 1(6); (2) but it did

decide that, if it was such a "practice", in order to prove its existence, plaintiff would have to prove not only a violation of Section 1(6) but must offer the same kind of proof as would be necessary to secure relief under Section 15(6) for a violation of Section 1(4). The Commission then concluded that:

> "Upon the record we conclude * * * that the allegation of unlawfulness under Section 1(6) of the Act has not been sustained." (276 I.C.C. at 662.)

In our brief in the lower Court we pointed out that it was incumbent upon the Commission to pass on this question of statutory construction because (1) the evidence was uncontroverted that the harbor allowances received by each of the New York harbor roads since 1915 had not been compensatory, (2) the defendants based their case on the argument that the harbor divisions "were never intended to cover the cost of performing the harbor service, or to have any relation to such cost, but that they have always been, and should continue to be, the result of bargaining between the carriers" (272 I.C.C. at 541); and (3) the Commission premised its decision on the finding that the cost of the harbor service was not included in the rate.

The Comment of the District Court on this issue was as follows:

> "Plaintiff next asserts that 'The Commission erred in failing to find that the maintenance of the present harbor allowance is an unlawful practice in violation of Section 1(6) of the Act.'
>
> "In arguing the point strenuous attempt is made to create the impression that the Commission did not pass upon this question. The failure of the first report to discuss or decide it is stressed. And then, in commenting on the denial of relief to the plaintiff by the Commission in its second report, plaintiff's reply brief states 'It may not lawfully do that, without due investigation and a valid finding on this issue.' Completely

overlooked is the Commission's specific finding in its second report that '*Upon the record, we conclude* that the allowances assailed have not been shown to have been or to be unjust, unreasonable, inequitable, or unduly prejudicial as alleged, and *that the allegation of unlawfulness under Section 1(6) of the act has not been sustained.*' (Emphasis supplied.)

"Plaintiff's avowed purpose in invoking Section 1(6) of the Act was to seek prescription of minimum harbor allowances for its competitors in New York Harbor, in order that the plaintiff could avail itself of such allowance as the Commission might prescribe for it under Section 15(6). The Commission explained plaintiff's position in these words, 'The complaint was filed against all of the carriers participating in the joint rates, including harbor lines other than the Jersey Central, and sought prescription of the same allowances for all harbor lines, in order to prevent undue prejudice that otherwise would allegedly result from diversion of traffic, by rail connections, from the Jersey Central to other harbor lines with lower harbor allowances.' Thus the plaintiff, though nominally interested in proving the existence of an unlawful practice, in reality sought a change in the existing divisional arrangements among the twelve other New York Harbor carriers and their connections under the joint rates. Had the plaintiff succeeded, the Commission would have prescribed increased harbor allowances for the other harbor carriers as 'just, reasonable, and equitable divisions' of joint rates without having had before it, as to the other harbor roads, evidence bearing upon the elements required for its consideration under Section 15(6) of the Act. A similar circumvention of the divisions statute was stricken down in Baltimore & Ohio R.R. Co. v. United States, 277 U. S. 291, 300, where the Court said that divisional arrangements under joint rates are not a practice and added: 'But even if the matter in controversy were a "practice" within the meaning of the Act, the Commission would not be authorized to set it aside without evidence that it is unjust or unreasonable. Paragraph (6) of Section 15

empowers the Commission to prescribe divisions of joint rates, but there must be evidence adequate to justify action. Brimstone Railroad & Canal Co. v. United States, 276 U. S. 104; United States v. Abilene & Southern Ry. Co., 265 U. S. 274; New England Divisions Case, 261 U. S. 184. That rule may not be avoided by a broad construction of the word "practice".'

"The proofs offered by the Central, or rather, the lack of them, produced a fact result that justified the Commission's holding that the charge of unlawful practice had not been sustained. Cf. R.C.A. v. United States, 341 U. S. 412." (pages 39-41) 99 Fed. Supp. at 573.

It is submitted that the District Court erred in holding that this case is similar to the *B&O Case* (277 U. S. 291) and that in order to prove a violation of Section 1(6) and be entitled to relief under Section 15(1), the plaintiff must submit the same kind of proof as is necessary to prove a violation of Section 1(4) and secure relief under Section 15(6). As this Court clearly pointed out in that *B&O Case*, the only burden of proof under Section 1(6) is to show a "practice" that is "unjust and unreasonable." The controlling point in the *B&O Case* was that the issue there was between the complainants and their *connecting carriers* and, therefore, should have been brought under Sections 1(4) and 15(6), whereas here the complaint is against *competing carriers* and is under Sections 1(6) and 15(1). The evidence conclusively establishes that the harbor allowances have been deliberately maintained by the defendants at a non-compensatory level over a long period of years to the great prejudice of plaintiff and the public. This constitutes a "practice" in violation not only of Section 1(6) but of the national transportation policy. (Title 49, U.S.C.A., note preceding Section 1). When such a practice was complained of and the uncontroverted proof showed that the

amount of the allowance was below cost as to each of the New York Harbor roads; that the allowance had been deliberately maintained by defendants over plaintiff's protests at a non-compensatory level for over thirty years; and that it was highly prejudicial to the plaintiff and to shippers who do not use the harbor service, the Commission had an affirmative duty to act. Whether the Commission should make a ruling on this issue was not purely discretionary but quasi-judicial and it was, therefore, incumbent on the Commission to rule on both the law and the fact issue involved. (Chicago Junction Case 264 U. S. 258.)

The District Court's opinion does not disclose whether its decree of affirmance was based on its construction of Section 1(6) or on an alleged lack of proof. If based on the view that the practice described was not an "unlawful practice" within the meaning of Section 1(6), it is submitted that the Court erred in its construction of the statute. If based on the view that the proof was deficient, then it is submitted that the Court erred in disregarding the admitted fact that the harbor allowance for years has been and now is non-compensation.

As to the Fifth Amendment

The complaint was filed with the Commission on July 3, 1944. Pending relief, the plaintiff has been, since that date, and will continue to be, under compulsion to perform the lighterage and floatage services under rates prescribed by the Commission, (B&O RR Co. v. U. S., 298 U. S. 349 at 357) and subject to the harbor divisions complained of (Title 49 U.S.C.A. Sec. 76B).

The record before the Commission contained an unusually thorough, and detailed study of the excess harbor cost of all floatage and lighterage performed by the petitioner for the complete year 1939 (Exs. 26-55 161-77 R-128-272,

1013-37), accompanied by a complete statement of the method and the source of the data used. (Exs. 68, R-407-414) Without reviewing this evidence in detail its significance may be summarized by stating that it indicates a loss to the plaintiff for the year 1939, allowing no return on investment, in excess of $1,000,000.00. One of defendants' chief witnesses testified that the harbor costs of all of the harbor roads had been recognized by the harbor defendants ever since 1915 as being below cost (R-584-5, 597). Respecting the plaintiff's harbor cost, the Commission in its first report found that for the year 1939 (when the harbor allowance was 4.4¢ per hundred pounds)

> "The average cost of the harbor service exceeded that of normal origination or termination within the terminal area described by $1.42 per ton (7.1 cents per hundred pounds) for floatage, and by $2.64 per ton (13.2 cents per hundred pounds) for lighterage." (272 ICC at 584)[4]

Thus it appears that the evidence, the admissions of defendants' witness, and the findings of the Examiners and the Commission in its first report (272 I.C.C. at 579) all show that the harbor divisions for many years have been substantially below cost.

In its second report the Commission did not reexamine or modify its above quoted finding, but having "assumed" that the rates did not include the full cost of the harbor service, it in effect treated the plaintiff's harbor costs as irrelevant by stating that "further discussion of the Jersey Central cost could serve no useful purpose." (276 ICC at 658)

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[4] At the argument before the Commission on April 25, 1949 defendant's counsel stated that he "did not disagree with any finding in the Commission's first report as to Jersey Central harbor cost" (except as to one minor detail). (R-1656)

Against the above background the only comment of the District Court respecting our complaint that the Commission's order of dismissal was confiscatory is the following excerpt from its opinion:

> "Finally, says the plaintiff, the Commission in dismissing the complaint acted contrary to the Fifth Amendment and so left the plaintiff without remedy for confiscatory divisions of joint rates prescribed by the Commission itself.
>
> "The premise to this assertion, i.e., that the divisions to the Jersey Central from the joint rate are confiscatory, is not borne out by the record. Those divisions do not just consist of the Central's harbor allowances but include a percentage division of the joint rate as a line-haul carrier and for origination and termination of freight. Every one of the harbor railroad group receives the same type of allotments from the joint rate. There is nothing in this record to indicate the total divisions received by the Jersey Central and the other harbor lines in compensation for their various services out of the joint New York rate, are confiscatory. There is, at the very least, no satisfactory proof of excess cost of harbor service of any of the lines with the exception of the Jersey Central. Plaintiff claims, correctly we think, that as a matter of competition it could not afford to accept higher compensation for its harbor service than the allowances received by the other harbor lines since in that event it would surely lose its business to those other carriers. But as already mentioned, this case is barren of inference that the divisions of the joint rate to those other lines are unfairly low.
>
> "In addition to the above, plaintiff's proof of its own harbor costs is strongly attacked by the defense on the ground that it is predicated on a stale survey made back n 1939; that the harbor services, including plaintiff's have been inefficiently operated and that a late check would be bound to show improvement es-

pecially in connection with the lowering of the cost of those services.

"On the whole record it is apparent that the action of the Commission in dismissing the complaint does not amount to confiscation as charged." (Pages 43-47) **99 Fed. Supp. at 575.**

In other words, the District Court dismissed the complaint of confiscation, *first*, because the plaintiff's terminal division does not include all of the revenue it receives out of the joint rates, and, *second*, because plaintiff's costs have "been strongly attacked by the defense" on various grounds.

As to the first point, it is true that the harbor division complained of is a deduction from the joint rates to cover the terminal service, and the balance is then divided on an agreed percentage basis between the participating carriers, including the plaintiff, as compensation for the road-haul service. As the record shows, however, the terminal deduction is separately published and filed with the Commission; it has always been treated separately from the road-haul divisions; and at a pretrial conference the parties stipulated and the Commission, by its Order of August 3, 1945, ordered that:

> "1. The complaint, it is to be understood, is directed solely to the alleged inadequacy of the allowance received by complainant and by defendants named in paragraph IV of the complaint (the other harbor carriers) for the performance of lighterage or car-floatage service within the free lighterage limits of New York Harbor, out of joint rates on interstate and foreign traffic, * * *."

Moreover, at the opening of the hearings certain of the defendants, notwithstanding the stipulation referred to above, made a motion that the complaint be dismissed on the ground that it brought in issue only the lawfulness of the Harbor allowance. This motion was overruled by the Ex-

aminers (272 ICC at 532). The case was thereafter heard, argued, briefed and decided with the clear understanding by all parties that the sole issue presented under Sections 1(4) and 1(6) was the lawfulness of the harbor allowance.

Such procedure was in harmony with the Commission's consistent practice in previous terminal division cases. (*P. & W. V. Ry. Co.* v. *P. & L. E. RR. Co., et al.*, 61 ICC 272; *E. J. R. R. & T. Co.* v. *C. R. R. of N. J. et al.*, 63 ICC 80; *Morgantown and Wheeling Ry. Co.* v. *P. R. R.*, 63 ICC 197; *Ohio and Kentucky Ry. Co.* v. *L. & N.*, 77 ICC 636; *New York Dock Ry. Co.* v. *B. & O. R. R. Co.*, 87 ICC 695; *New England Divisions Case*, 126 ICC at 646; *Hoboken Manufacturers R. R. Co.* v. *A. T. & S. F. Ry. Co.*, 132 ICC 579, and succeeding cases, and was approved by this court in the *New England Divisions Case*, 261 U.S. 196-7. As the above cases show, the practice of the Commission in dealing with terminal divisions prior to the present decision had been to deal with the "divisions complained of" and provide, as its original decision in this case did. (272 I. C. C. at 589), "that the amounts remaining of the joint rates over and above" the division thus to be received by complainant, "* * * be divided among the defendants as are the amounts remaining of the joint rates after deduction of the present allowance, or as they may agree; or failing such agreement, as may be determined by us in an appropriate proceeding."

Moreover, in answer to this same argument, plaintiff called the attention of the lower court to the decision in *Southern RR Co.* v. *St. Louis Hay and Grain Co.*, 214 U. S. 297 (1909), where it was determined by this court that when compensation for a terminal service is complained of, even though a railroad receives other revenue on the same shipment in compensation for its road-haul service, it is nevertheless entitled "to full compensation, including some profit" for performing an additional terminal service. In

the present case, as in that case, "the separate service is not a part of but is in addition to the regular line-haul service." The fact that the compensaton involved in the Hay Case was in addition to the rate paid by the shipper, whereas, in this case it is included in the rate, seems immaterial since it was settled in *B & O* v. *U. S.*, 298 U. S. at 357-8, that a carrier is entitled to complain of confiscation in a divisions case just as in a rate case. Manifestly, if there is a taking of the plaintiff's property in violation of the Fifth Amendment plaintiff's constitutional right is the same whether the party unjustly enriched is another railroad or a shipper.

The second reason given by the District Court for dismissing the complaint of confiscation is that plaintiff's proof of its harbor cost "is strongly attacked by the defense". The Court gives no indication that it had itself examined the evidence as to plaintiff's harbor cost. It does not even refer in its opinion to the findings of fact in the Commission's first report as to plaintiff's harbor cost, which findings have not been modified or withdrawn. It seems clear, therefore, that the Court's treatment of the voluminous evidence on this cost question falls far short of "independent findings of fact" which it is incumbent on a reviewing court to make when confiscation is charged. (*St. Joseph Stockyards Co.* v. *U. S.* 298 U. S. 38 at 51-4 (1935).)

It is submitted that the District Court erred in its treatment of the charge of confiscation.

As To Judicial Review

The District Court's opinion instead of recognizing and ruling on the above legal issues consists largely of a factual reply, seriatim, to the points urged in the plaintiff's brief, which it characterizes as "gross overstatement", "not at

all persuasive", "palpably incorrect", "strenuous attempt to create the impression" and "plaintiff's deliberate failure to produce adequate proof."[5] The opinion makes no reference whatever to the elaborate findings of fact made by the two Examiners who heard the case, which findings were adopted by the Commission in its first report and have not been withdrawn; nor to the reasoning of the first report; nor to the dissenting opinion of four Commissioners attached to the second report. (276 I. C. C. at 662-7). In this respect the opinion, although citing, seems to disregard the recent admonition of this court in construing the Administrative Procedure Act which directed attention to the Congressional purpose that courts, in reviewing administrative orders, should consider the whole record "including the body of evidence opposed to the Board's view" *Universal Camera Corp.* v. *Labor Board* (340 U. S. at 488). It is not apparent that the District Court heeded this admonition. On the contrary, it seems to have ignored the admissions by defendants, the weight of the evidence and the findings of fact and reasoning of the Commission's first report based upon this court's construction of Section 15(6) in the B & O Case, and to unqualifiedly reject all of plaintiff's comments and to endorse all of the "fragmentary observations" and conclusions of the second report. (276 I. C. C. at 662)

In short, the District Court's opinion, in several respects, disregards the construction placed by this court on the statute; it disregards the body of evidence opposed to the conclusions expressed by the Commission in its second report; it treats the issues involved as if the division of joint rates was still of concern only to the adversary parties; and it appears to accept and rest upon the defendants' theory that, although the complaint invoked and, we

[5] Owing to this circumstance, the assignment of errors is unavoidably detailed.

believe, the evidence amply justified relief according to the standard specified in Section 15(6) and Section 15(1), yet since plaintiff had originally relied upon a formula based upon relative cost of the harbor, as compared with cost of the line-haul service, which formula was rejected in the Commission's first report without exception being taken by plaintiff, therefore the absence of line-haul cost, available only to the railroad defendants, constituted a fatal defect in the record, thus giving no consideration to the legal premise on which this court's opinion in the B & O Case and the Commission's first report was based, to the effect that:

> "If the harbor allowance to that carrier (CRR of NJ) based upon the correct use of those data, is reasonable, and is deducted from a joint rate that is reasonable, the remainder of the joint rate must be viewed as reasonable." (272 I. C. C. at 584)

F. The Substantial Character of the Issues

A fundamental question presented by this appeal is whether the constructions placed on Sections 1(4), 15(6), and 15a(2) by this Court in the *New England Divisions Case*, 261 U. S. 184 (1933) and *B. & O. R. R. Co.* v. *U. S.*, 298 U. S. 349 (1936) are still controlling, so that the division of joint rates between railroads is to be regulated in the public interest, or whether, owing to the defects of administrative procedure, the fixing of divisions has again become a purely private problem beyond the reach of jurisprudence and subject only to private bargaining.

The Commission in its second report failed to observe the doctrine of the New England Case that divisions are effected with a vital public interest and that, in view of the inherent complications where hundreds of parties and millions of divisions are involved, the procedure and evidential rules applicable in ordinary adversary proceedings

should be modified, in order that the statute be made workable, by limiting the issues to the subject matter of the complaint and applying the "typical evidence rule". By thus ignoring the practical construction of the Act which this court deemed necessary to make it workable and its own previous practice, the Commission, after first finding ample evidence to call for relief, cleared the way for its order of dismissal based upon an alleged burden of proof which only defendants could supply.

As above indicated, the Commission also failed to observe the doctrine of the B. & O. Case that:

> "There was before the Commission no question as to the validity of the joint rates. There was no claim that they were not sufficient to cover 'out-of-pocket costs', i.e., the amount by which performance of the service covered by the rates caused operating expenses and taxes to be higher than otherwise they would have been. Nor was it suggested that they were confiscatory, i.e., not sufficient to cover operating expenses and taxes justly apportionable to the traffic plus an amount reasonably sufficient in the circumstances to constitute just compensation for the use of the carriers' property in that service. The division of presumably reasonable rates was the only problem before the commission. Neither complaint alleged that existing divisions were not more than sufficient to cover the out-of-pocket costs or that they were confiscatory." (298 U. S. at 356)

and further

> "In proceedings to determine and prescribe divisions the commission is governed by §§ 1(4), 15(6), 15a(2); it is not required or authorized to investigate or determine whether the joint rates are reasonable or confiscatory. The question whether it complied with the requirements of the Act does not depend upon the level of the rates or the amounts of revenue to be divided. The purpose of the provisions just cited is

> to empower and require the commission to make divisions that colloquially may be said to be fair." (298 U. S. at 357)

By disregarding the above construction of the statute, the Commission cleared the way for its finding or rather "assumption" that the "joint rates, or at least most of them, do not include the full cost of the harbor service" and "therefore, for the purpose of this proceeding, must be assumed to be below a maximum, reasonable level." (276 I. C. C. at 658)

Prior to 1920, the Commission had repeatedly held that the fixing of divisions was a matter for bargaining over which it had no jurisdiction, but as this Court pointed out in the *New England* case, an "indispensable" feature of the new railroad policy enacted in 1920, was Section 15(6), empowering and directing the Commission to regulate divisions in the public interest. Ever since the above decisions were announced the Commission has faithfully followed the construction placed on the statute by this Court in those cases, until the present decision. "For the purpose of this proceeding", however, the Commission in its second report has injected an impractical burden of proof requirement in place of the "typical evidence rule"; and it has treated the rates as well as the divisions as "in issue". (See brief of the Commission in the Lower Court p. 25); it ignores the presumption which this Court announced in the B. & O. Case; and it assumes that the rates it prescribed as maximum reasonable rates are below a "maximum, reasonable level."

Another fundamental issue directly involved is whether the Commission's jurisdiction in proceedings arising under Section 1(6) and Section 15(1) is wholly discretionary or whether, as this Court, in construing a similar statutory provision, held in the *Chicago Junction* case, 264 U. S. 258,

the Commission's jurisdiction is quasi-judicial and imposes an affirmative duty on the Commission to make definite findings as to both the law and the facts.

Further, the issue is squarely presented as to the validity of the District Court's failure to dispose of the confiscation issue by relying on the circumstance that plaintiff's proof "is strongly attacked by the defense", instead of making an "independent judicial review upon the facts and the law" and arriving at an "independent judgment" on the record as a whole as to whether or not plaintiff's property is being taken without just compensation. (*St. Joseph's Stockyards Co.* v. *U. S.*, 298 U. S. 38 at 51.)

Finally, the issue is presented whether the District Court, in reviewing the issues of fact and law, complied with the requirements of the Administrative Procedure Act (U.S.C. Title V, Sect. 1009(e)) as recently construed by this Court in *Universal Camera Corp.* v. *Labor Board,* (supra).

In view of the above issues, it is submitted that, if the orders of the Commission and the decree of affirmance by the District Court are not set aside, there will be grave doubt as to the possibility of any aggrieved railroad, complaining of unjust divisions of joint rates, hereafter securing any administrative or judicial relief under Sections 1(4), 1(6), 3(4), 15(1), or 15(6) of the Interstate Commerce Act, or even under the Fifth Amendment.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

Civil No. 97-51

OPINION

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant.

Appearances:

Markley & Broadhurst, By Edward A. Markley, Attorneys of Record for Plaintiff, and Judson C. McLester, Jr., and Alexander H. Elder, Of counsel.

McCarter, English & Studer, By Augustus C. Studer, Jr., Attorneys for Akron, Canton & Youngstown Railroad and Other Intervening Railroad Defendants; and Lawrence Chaffee, Kemper A. Dobbins, Theodore H. Burgess, Of counsel.

John F. Baecher, Special Assistant to the Attorney General, for the United States.

J. Stanley Payne, Associate Chief Counsel for the Interstate Commerce Commission, for the Commission.

Before McLAUGHLIN, Circuit Judge and SMITH and FAKE, District Judges.

By McLAUGHLIN, Circuit Judge.

Plaintiff seeks to set aside an order of the Interstate Commerce Commission dated December 29, 1949 which in turn had set aside a prior order of the Commission dated October 11, 1948 and dismissed the complaint in the cause. Plaintiff also asks that the Commission's order of May 18, 1950 dismissing its petition for reconsideration be set aside. As the Code requires, the suit is brought against the United States. The Interstate Commerce Commission and 20 of the 245 railroad companies that were named as defendants below have intervened.

The litigation revolves around allowances for car-float and lighterage service in New York Harbor. In the proceedings before the Commission, the complaint named as defendants the 12 other New York Harbor roads, as well as all of the connecting railroad carriers operating in Official Territory [6] and participating in joint rates between New York Harbor and other points in and beyond said territory. The complaint alleged that the allowances which accrued to the plaintiff and other New York Harbor lines, for the performance of car-float and lighterage service within the free lighterage limits of New York Harbor out of joint class and commodity rates were inadequate, unjust and unduly prejudicial to the plaintiff, and unduly preferential of defendant lines, in violation of Sections 1(4) and 3(4) of the Interstate Commerce Act. It was further alleged that the defendants' practice of maintaining said allowances at a non-compensatory level was an unjust and unreasonable practice in violation of Section 1(6) of the Act. Plaintiff prayed that the Commission prescribe the minimum division of the joint rates to be received by the plaintiff and the other New York Harbor roads as compensation for the lighterage and floatage service. After hearing, the Commission raised the allowance from 4.4¢ a 100 pounds for float shipments to 6¢ per 100 pounds and increased the 4.4¢ allowance per 100 pounds on lighterage shipments on a sliding scale to from 6 to 11¢ per 100 pounds depending upon the amount of the joint rate. These new allowances were to be further increased by the same percentages as the joint rates had been increased in certain other Commission proceedings.

Following the entry of its report [7] and order to the above effect, upon petition of certain of the defendants, the proceeding was reopened by the Commission for reargument and reconsideration. Thereafter [8] the Commission, in

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[6] Official Territory is the area bounded generally by the Potomac and Ohio Rivers on the south, the Mississippi on the west, the Canadian Border on the north and the Atlantic Ocean on the east.

[7] 272 I.C.C. 529.

[8] 276 I.C.C. 655.

reversing its prior decision, found that "* * * the great bulk of the New York rates, the divisions of which are here in issue, do not include the full cost of the lighterage and floatage services in New York Harbor which are performed under such rates." Therefore, the Commission held that it was precluded "* * * from prescribing allowances for lighterage or floatage services as divisions of joint rates based primarily upon the cost of the harbor service alone, and without careful consideration of the cost of the line-haul and other services performed under such rates." The Commission affirmed its finding made in the previous report and for the reasons given therein, that the plaintiff's data purporting to show the costs of the non-harbor services performed under the joint rates was unacceptable. The Commission specifically found that there was no reliable cost data in the record of the case "* * * for measuring the justness and reasonableness of the harbor allowances by the divisions of the joint rates received by the connecting carriers." The Commission then concluded upon the record, "* * * that the allowances assailed have not been shown to have been or to be unjust, unreasonable, inequitable, or unduly prejudicial as alleged, * * *." Regarding the charge that the acquiescence of the other New York Harbor lines and their connecting carriers in non-compensatory harbor allowances constituted an unlawful practice under Section 1(6) of the Interstate Commerce Act, the Commission held "* * * that the allegation of unlawfulness under section 1(6) of the act has not been sustained."

Objections to the Findings of Fact

Plaintiff first argues that the Commission's report and order "* * * is unsupported by any valid findings of fact, * * *." In attempted substantiation of this five propositions are presented. The first of these calls the Commission's finding that "* * * the great bulk of the New York rates, * * *, do not include the full cost of the lighterage and floatage services in New York Harbor which are performed under such rates.", a "fallacious assumption".

The above finding, rather than being fallacious, is amply supported by decisions of the Commission in other proceedings and by the evidence below. The undisputed reason for the level of the basic rates into New York from points west and south thereof was the competition between the rail lines and the boat lines operating on the Erie Canal, and those rates, first established by the New York Central which performed no lighterage service, were later met by the other rail lines. New York Harbor Case, 47 I.C.C. 643, 707-708. In that decision the Commission found that "There is no evidence whatever to show that the basic rates from Chicago to New York include any allowance for terminal services." Later the Commission, in Eastern Class Rate Investigation, 164 I.C.C. 314, 447, approved the addition of ten miles on the New York end" * * * not as a measure of the cost of water-borne traffic in New York Harbor but merely a device for securing representative group distances." Neither plaintiff's attempted distinction of the Eastern Class Rate case nor its effort to eliminate the fundamental reason for the New York Harbor allowance situation as ancient and long ago discarded, are at all persuasive. It is noteworthy that the plaintiff neither before the Commission nor to this Court, has called attention to any decision standing for the doctrine that the New York joint rates take into consideration the full cost of unusual harbor terminal services. Nor has the plaintiff been able to explain away the fact that in the more recent general revenue proceedings since the New York Harbor case and the Eastern Class Rate case, as the Commission stated in its second report, 276 I.C.C. 655, 657, "* * * no special consideration was sought of, or given to unusual terminal services, at New York or elsewhere, and the general increases therein authorized did not, and were not intended to, make any change in the relative transportation burden to be borne by the rates to and from New York as compared with the rates to and from any other points." Moreover, there was in the record below strong testimony by defendants' witness Butler which fully justifies the Commission finding. And this Court cannot ignore the frank assertion made by the plaintiff in its motion before

the Commission to dismiss the petition of certain defendants for reargument and reconsideration, where on pages 13 and 14 of the plaintiff's motion it was said: "Although it may be quite true that the rates to and from New York Harbor do not include specific extra allowances for the excess costs of harbor service, no one has complained that the rates themselves are not reasonable rates for the entire service rendered."

Plaintiff's second point under this general head is that the Commission misinterpreted the cost studies of the principal defendant harbor lines which were in evidence on behalf of the plaintiff. Those studies consisted of certified abstracts of testimony and exhibits introduced by the harbor lines in prior proceedings before the Commission.[9] As the Commission found, the studies were for different periods than plaintiff's harbor costs; they were not prepared in the same manner or upon the same basis as the plaintiff's costs and they did not, in the words of the second report, "* * * show the excess cost of the harbor service over the ordinary origination and termination cost, * * *" as outlined in the plaintiff's own cost study. The Commission held, as it had in its first report, that "* * * the studies thus offered, even as evidence of total harbor costs, are incomplete." There is no substantial challenge of the Commission's above fact findings. From those findings it is obvious that the studies were not fairly comparable with the Central's own survey of its costs.

Complaint is then made of a statement in the Commission report which reads: "If increased harbor allowances are to be based in part on the excess cost of the harbor service over the ordinary origination and termination cost, and if as complainant contends such allowance must be the same for all of the harbor lines, it follows that the excess costs to be used are not those of any one carrier, but the average for all of the harbor services for which the allowances are made." Plaintiff states that the Commission "* * *

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[9] Lighterage and Storage Regulations at New York, 35 I.C.C. 47; Lighterage Cases, 203 I.C.C. 481; State of New Jersey v. Baltimore & Ohio R.R. Co., 245 I.C.C. 581; Agwilines, Inc. v. Akron, C. & Y. Ry. Co., 248 I.C.C. 255.

evidently assumed that there was no such evidence of 'average cost' in the record" and goes on to conclude that the Commission made an "Erroneous finding that evidence of 'average cost' is lacking."

What the Commission really found was that proper proof was lacking of the actual excess costs of the harbor services to the other harbor lines; the kind of proof that had been put into evidence by the plaintiff of the excess costs of its own harbor services. Proofs that plaintiff did introduce with respect to the allegedly true excess costs of the New York Harbor service to the other harbor lines, as has been stated, concerned different periods than the harbor costs of the Jersey Central which were in evidence. They were not prepared in the same manner or upon the same basis as the Jersey Central costs and, in the language of the second report, "They do not purport to show the excess cost of the harbor service over the ordinary origination and termination cost, as is the case in the Jersey Central study." Nowhere in the testimony of the witness Wilson, which is stressed by the plaintiff, is there evidence of ordinary origination and termination costs of any of the harbor carriers. That evidence is, therefore, subject to the same objection as the data offered by the plaintiff regarding the harbor costs of the other harbor lines.

Plaintiff's fourth objection is that the Commission made the "Erroneous finding that there is 'no evidence' of the divisions on service performed as between the other harbor carriers and their connections." Effort is made to support that statement by reference to exhibits produced by defendants' witness Butler and his testimony in connection therewith.

The actual language of the Commission was that: "There is no evidence, however, as to the divisional arrangements between the other harbor lines and their connections under the joint rates applying in connection with those lines on the principal or typical commodities nor as to the extent of the service performed by the other harbor lines compared with the service performed by their connections under such rate. There is no indication that the divisional arrangements between the Jersey Central and its connec-

tions are representative of the divisional arrangements between the other harbor lines and their connections, nor that the commodity rates shown as applying in connection with the Jersey Central in all respects typical of those applying in connection with the other harbor lines. The record is deficient in this respect."

We have examined each of the Butler exhibits and they in nowise contradict that finding. To point up the deficiency mentioned by the Commission we need only look to the kind of evidence presented by the plaintiff regarding its own harbor service. That type of proof was not submitted with respect to the other New York Harbor lines and that lack is the precise deficiency above mentioned by the Commission. Plaintiff's chief traffic witness, Ewing, introduced several exhibits listing the principal commodities handled in lighterage service by the plaintiff during the ten year period, 1934-1943, and the principal commodities in car-float service in the five year period from 1939-1944. He also showed in these exhibits the divisional arrangements, including the harbor allowances, between the plaintiff and its connecting lines of the joint rates on such principal commodities. The evidence as to the divisions on lighterage traffic revealed practically all of the commodities handled in that service by plaintiff during the ten year period. The presentation as to the car-float traffic consisted of the divisions of more than 2,000 rates on some 450 commodities. But there was no evidence in the record before the Commission as to the principal or typical commodities handled in harbor service by the other harbor lines, the rates thereon, or the divisional arrangements of such rates between the other harbor lines and their connecting lines. Some of Butler's exhibits relied on by plaintiff as supplying this deficiency merely related to certain class rates between New York and representative points and the present divisions of such rates together with the divisions as they would be under the formula proposed by plaintiff. The remaining Butler exhibits simply indicated the number of cars handled in harbor service during the month of October, 1945, by the several New York Harbor lines, the territory in which they originated or terminated,

the revenue of the New York Harbor lines during that month, and the revenue of their connections, and the revenue as it would be under the formula proposed by plaintiff. The Butler exhibits had nothing to do with the divisional arrangements under the joint rates between the other harbor lines and their connections in the movement of their principal or typical commodities. That being so, the Commission could not have concluded that the principal or typical commodities handled by the other harbor lines in harbor service were transported under class rates. The record before the Commission warrants its finding as to the deficiency of the above evidence.

The last objection of the plaintiff with respect to alleged factual errors in the report deals with a minor item in connection with the Commission's conclusion that "It does not follow, because the total operating and other costs mentioned have risen, which have been met by general increases in rates, that an increase must also be made in the harbor allowances in *exactly* the same ratio." (Emphasis supplied).

We think that conclusion sound and, in the absence of competent proof that the harbor allowance sought should be in exactly the same proportion as the joint rate increases since 1915 (which have not only been authorized but put into effect) the fact that in prior rate decision the Commission did allow the same proportionate increase in the harbor allowance as it granted in the joint rates, can hardly be said to be binding upon the Commission in this case in the face of its present above quoted language.

In addition, the Commission's above comment was soundly based on the record before it. Plaintiff failed to prove that the present New York rates contain all of the percentage increases authorized by the Commission since 1915. Defendant railroads vigorously deny that such is the fact and they point to the testimony of plaintiff's principal traffic witness, Ewing, who, in discussing his own exhibits, admitted that there have been substantial reductions in the past 15 or 20 years and for many years prior to that in a great number of rates which move traffic to and from New York. It appears that rate reductions made

after general revenue cases are not unusual and that, according to Ewing, the depressed rates mentioned by him were effected to meet truck and canal competition and for other reasons, such as consideration of what the traffic would bear, the nature of the traffic, problems of loading, etc.

Alleged Errors of Law

Under this caption it is first argued that, since the primary issue in this litigation is harbor costs and not the over-all joint rates, the latter must be presumed to be reasonable under Baltimore & Ohio R. R. Co. *v.* United States, 298 U. S. 349, and that the Commission erred in its construction of Section 15(6) of the Act[10] by ignoring such presumption.

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[10] Section 15(6) of the Interstate Commerce Act, 49 U.S.C. reads:

'Commission to establish just divisions of joint rates, fares, or charges; adjustments. Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

The Jersey Central by means of this litigation is endeavoring to obtain an increase in its harbor allowance out of the joint New York rates. The Commission at no time has objected to the Central making harbor costs the primary issue. In a strictly divisions case, as said in Baltimore & Ohio R. R. Co. *v.* United States, supra at 357, "* * * the commission is governed by Sections 1(4), 15(6), 15a(2); it is not required or authorized to investigate or determine whether the joint rates are reasonable or confiscatory. * * * The purpose of the provisions just cited is to empower and require the commission to make divisions that colloquially may be said to be fair." We need not concern ourselves with the question of whether the unusual factual situation present in this matter would permit it to be classified as within the group governed by the B. & O. decision because here the Commission did not hold that the New York rates were not reasonable. Such a ruling was not important to its decision and was not contended for by any of the defendants. The Commission did say that since "* * * the joint rates, or at least most of them, do not include the full cost of the harbor services, * * * for the purposes of this proceeding, [they] must be assumed to be below a *maximum* reasonable level." (Emphasis supplied.) This is a far cry from plaintiff's statement that the Commission "* * * necessarily determined that the New York rates which it had prescribed, were not compensatory, * * *." All the Commission did was to find that since one division of presumably reasonable joint rates was below cost, the joint rates themselves for the purposes of this action would be assumed to be below a "*maximum* reasonable level." (Emphasis supplied.) The Jersey Central, itself, in its already referred to motion to dismiss defendants' petition for reargument and reconsideration after the filing of the first report, would seem to be in agreement with this thought of the Commission. Speaking of those specific New York joint rates, it there said, "*There is, of course, a wide range between minimum reasonable rates and maximum reasonable rates* and no one has attempted to say where in that range these rates come." (Emphasis supplied.)

The second alleged error of law by the Commission is said to be that the Commission concluded "* * * that it could not pass on the 'fairness' of the terminal allowance complained of without, at the same time, determining the adequacy of all the other subdivisions of the countless rates involved." This is a gross overstatement of the holding of the Commission. The Commission did not conclude, as the plaintiff would have us believe, that in prescribing harbor allowances, it had to require "* * * specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, * * *." The Supreme Court, in the New England Divisions Case, 261 U. S. 184, 196, had termed such a construction of the divisions statute, Section 15(6), unworkable and not required either by the Interstate Commerce Act or by the Constitution. The Court there laid down the "typical evidence rule" which in brief permitted the Commission to order a general increase of divisions to carriers "* * * based upon evidence which the Commission assumed was *typical in character, and ample in quantity*, to justify the finding made in respect to each division of each rate of every carrier." (Emphasis supplied.) Here, what the Commission in fact concluded was that "The just, reasonable, and equitable division or allowance for harbor service to which the complainant or any of the other harbor lines is entitled, as part of the total service performed by all of the carriers under the joint rate, can be determined only by considering the respective divisions of the rate and the services rendered thereunder, *with the object of reasonably relating the harbor allowance to the portions of the rate distributed among the respective line-haul carriers.*" (Emphasis supplied) and that for it to revise the harbor service allowances it would need sufficiently comprehensive evidence produced before it "* * * to enable us to determine that the resulting divisions, not only of the Jersey Central, but of the other harbor lines, as well as of the line-haul carriers, will be just, reasonable and equitable." This is entirely consistent with the plaintiff's theory of its case, for plaintiff's counsel stated on the first oral argument before the Commission that "The entire case was presented on

the theory that there should be a division of the revenue in proportion to the respective costs of the harbor lines on the one hand, and on the line-haul carriers on the other hand." The Commission found that the needed proof was lacking. As detailed by the Commission in its second report, plaintiff's major failure of proof consisted in (1) unacceptable data purporting to show the costs of the non-harbor services performed under the joint rates;[11] (2) incomplete harbor cost studies on the other New York Harbor lines;[12] (3) no evidence as to divisional arrangements between the other harbor lines and their connections on the principal or typical commodities, the rates thereon, and the extent of service performed by the other harbor lines as compared with the service performed by their connections under such rates;[13] (4) little evidence relating directly to the efficiency of the harbor services.[14] It cannot be denied that there is a definite and vital relationship

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[11] 276 I.C.C. 655, 658. "Complainant's data purporting to show the costs of the non-harbor services performed under the joint rates were found in the prior report to be unacceptable. We affirm that finding, for the reasons given in that report, at pages 563-568. There are, therefore, upon this record no reliable cost data for measuring the justness and reasonableness of the harbor allowances by the divisions of the joint rates received by the connecting carriers."

[12] Id. at 659. "As found in the prior report, at page 579, the studies thus offered, even as evidence of total harbor costs, are incomplete."

[13] Id. at 660. "There is no evidence, however, as to the divisional arrangements between the other harbor lines and their connections under the joint rates applying in connection with those lines on the principal or typical commodities, nor as to the extent of the service performed by the other harbor lines as compared with the service performed by their connections under such rates. There is no indication that the divisional arrangements between the Jersey Central and its connections are representative of the divisional arrangements between the other harbor lines and their connections, nor that the commodity rates shown as applying in connection with the Jersey Central are in all respects typical of those applying in connection with the other harbor lines. The record is deficient in this respect."

[14] Id. at 661. "Under section 15(6) of the act we are required to give consideration, among other things, to the efficiency with which the carriers concerned are operated. • • • There is little evidence relating directly to the efficiency of the harbor services."

between the cost and amount of the harbor service and the cost and amount of the other services covered by the joint rates. As the Commission stated, "Before we can find unlawful any divisional arrangements, we must have before us evidence bearing upon the elements laid down for our consideration in section 15(6). United States *v.* Abilene & S. R. Co., 265 U. S. 274; Brimstone R. R. & Canal Co. *v.* United States, 276 U. S. 104."

Plaintiff argues at some length that the public interest and the national transportation policy require the increase it seeks. Neither the public interest nor the national transportation policy can be seriously urged as authorizing or permitting harbor allowance increases as divisions of joint rates for which there is either no proof at all or which are predicated on incomplete or improper proof. With substantial support from the whole record the Commission found that the Central's evidence added up to just that kind of a case and therefore, acting entirely within its statutory warrant, dismissed the complaint. This theory, unsupported by proper proof, that the public interest and national transportation policy demand that plaintiff's contentions be sustained, cannot be accepted as a legitimate substitute for the evidence specifically called for by Section 15(6) of the Act.

Plaintiff next asserts that "The Commission erred in failing to find that the maintenance of the present harbor allowance is an unlawful practice in violation of Section 1(6) of the Act."[15]

In arguing the point strenuous attempt is made to create the impression that the Commission did not pass upon this question. The failure of the first report to discuss

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[15] Section 1(6) of the Interstate Commerce Act, 49 U.S.C. reads:

"It is hereby made the duty of common carriers subject to the provisions of this part to establish, observe and enforce * * * just and reasonable regulations and practices affecting * * * all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property subject to the provisions of this part upon just and reasonable terms and *every unjust and unreasonable* classification, regulation or *practice is prohibited and declared to be unlawful.*"

or decide it is stressed.[16] And then, in commenting on the denial of relief to the plaintiff by the Commission in its second report, plaintiff's reply brief states "It may not lawfully do that, without due investigation and a valid finding on this issue." Completely overlooked is the Commission's specific finding in its second report that "*Upon the record, we conclude* that the allowances assailed have not been shown to have been or to be unjust, unreasonable, inequitable, or unduly prejudicial as alleged, and *that the allegation of unlawfulness under Section 1(6) of the act has not been sustained.*" (Emphasis supplied).

Plaintiff's avowed purpose in invoking Section 1(6) of the Act was to seek prescription of minimum harbor allowances for its competitors in New York Harbor, in order that the plaintiff could avail itself of such allowance as the Commission might prescribe for it under Section 15(6). The Commission explained plaintiff's position in these words, "The complaint was filed against all of the carriers participating in the joint rates, including harbor lines other than the Jersey Central, and sought prescription of the same allowances for all harbor lines, in order to prevent undue prejudice that otherwise would allegedly result from diversion of traffic, by rail connections, from the Jersey Central to other harbor lines with lower harbor allowances." Thus the plaintiff, though nominally interested in proving the existence of an unlawful practice, in reality sought a change in the existing divisional arrangements among the twelve other New York Harbor carriers and their connections under the joint rates. Had the plaintiff succeeded, the Commission would have prescribed increased harbor allowances for the other harbor carriers as "just, reasonable, and equitable divisions" of joint rates without having had before it, as to the other harbor roads, evidence

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[16] The sole reason for the Commission not passing upon the "unlawful practice" issue in its first report was, as stated in that first report, 272 I.C.C. 529, 580, "In view of the conclusions herein reached, it is unnecessary to discuss complainant's allegation that the performance by defendant New York Harbor lines of car-floatage and lighterage service at less than cost is an unreasonable practice, in violation of section 1(6) of the act."

bearing upon the elements required for its consideration under Section 15(6) of the Act. A similar circumvention of the divisions statute was stricken down in Baltimore & Ohio R. R. Co. *v.* United States, 277 U. S. 291, 300, where the Court said that divisional arrangements under joint rates are not a practice and added: "But even if the matter in controversy were a 'Practice' within the meaning of the Act, the Commission would not be authorized to set it aside without evidence that it is unjust or unreasonable.[17] Paragraph (6) of Section 15 empowers the Commission to prescribe divisions of joint rates, but there must be evidence adequate to justify action. Brimstone Railroad & Canal Co. v. United States, 276 U. S. 104; United States v. Abilene & Southern Ry. Co., 265 U. S. 274; New England Divisions Case, 261 U. S. 184. That rule may not be avoided by a broad construction of the word 'practice'."

The proofs offered by the Central, or rather, the lack of them, produced a fact result that justified the Commission's holding that the charge of unlawful practice had not been sustained. Cf. R.C.A. v. United States, 341 U. S. 412.

Actions of the Commission Alleged to Be Arbitrary and in Disregard of Due Process

Plaintiff urges that the "order of dismissal rests squarely on the premise that: 'the joint rates or at least most of them do not include the full cost of the harbor service and therefore for the purpose of this proceeding must be assumed to be below a maximum reasonable level.' "

It is palpably incorrect to say that the above is why the Commission dismissed the complaint. Plaintiff's deliberate failure to produce adequate proof from which the Commission would have been able to determine its equitable share of the joint rate for its harbor service was the fundamental reason why the complaint was dismissed. Whether because of conflict with its basic theory or for

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[17] This language of the Supreme Court derives directly from Section 1(6) of the Act which prohibits and makes unlawful "* * * every unjust and unreasonable * * * practice * * *."

some other reason, plaintiff made it entirely clear that it had no wish to supplement the present record with any additional evidence.[18]

It is also claimed that the action of the Commission was arbitrary because its order was based in part on findings of fact which are either wholly irrelevant or unsupported by evidence.

Under this point plaintiff once more attacks the Commission's conclusion that the New York rates do not include the full cost of the harbor service as derived from the Commission's observations regarding the New York Harbor Case and the Eastern Class Rate Investigation. It is again asserted that those observations are wholly irrelevant because they are based on an outmoded rate structure. The vital current importance of the New York Harbor Case and of the Eastern Class Rate Investigation to the issue before us was gone into early in this opinion. It is enough to say that once more plaintiff fails to cite any decision differing from the rationale of those cases.

Plaintiff's point under subdivision c of this branch of the argument repeats its erroneous statement that the Commission dismisses the complaint because the New York rates do not include the cost of harbor service. With that as a foundation it goes on to say that the dismissal was arbi-

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[18] Transcript of argument before this Court, page 99:

"Judge Fake: Mr. Elder [of counsel with plaintiff], a point has been made here that the Commission did not have before it sufficient evidence to reach the conclusion that you have been seeking, that they had extracts or excerpts from this, that or the other in the record, but nowhere sufficient evidence which would permit them to establish by ruling what you want. Now, what have you to say on that point, and do you want to go back, open it up and take further testimony or are you willing to rest on the record that you now have?"

Id. page 100:

"Mr. Elder: • • • Judge, this is the situation: If we had a rehearing before the Commission tomorrow—and it isn't possible, either, but if we had a further hearing before the Commission tomorrow, in my opinion there is no further relevant evidence that is available as to this petition.

"Judge Fake: That isn't the question. You are satisfied to go on with the record we now have?

"Mr. Elder: Exactly."

trary because the Commission at the time had in effect orders prescribing many of the New York rates as maximum reasonable. The argument is wholly without merit.

Subdivision d concerns the denial of reargument. There was nothing arbitrary or in disregard of due process in that action of the Commission. Cf. I.C.C. v. Jersey City, 322 U.S. 503, 515; Inter-City Transportation Co., Inc. v. United States, 89 F. Supp. 441, 443.

Fifth Amendment

Finally, says the plaintiff, the Commission in dismissing the complaint acted contrary to the Fifth Amendment and so left the plaintiff without remedy for confiscatory divisions of joint rates prescribed by the Commission itself.

The premise to this assertion, i.e., that the division to the Jersey Central from the joint rate are confiscatory, is not borne out by the record. Those divisions do not just consist of the Central's harbor allowances but include a percentage division of the joint rate as a line-haul carrier and for origination and termination of freight. Every one of the harbor railroad group receives the same type of allotments from the joint rate. There is nothing in this record to indicate the total divisions received by the Jersey Central and the other harbor lines in compensation for their various services out of the joint New York rate, are confiscatory. There is, at the very least, no satisfactory proof of excess cost of harbor service of any of the lines with the exception of the Jersey Central. Plaintiff claims, correctly we think, that as a matter of competition it could not afford to accept higher compensation for its harbor service than the allowance received by the other harbor lines since in that event it would surely lose its business to those other carriers. But as already mentioned, this case is barren of inference that the divisions of the joint rate to those other lines are unfairly low.

In addition to the above, plaintiff's proof of its own harbor costs is strongly attacked by the defense on the ground that it is predicated on a stale survey made back in 1939; that the harbor services, including plaintiff's have been inefficiently operated and that a late check would be bound

to show improvement especially in connection with the lowering of the cost of those services.

On the whole record it is apparent that the action of the Commission in dismissing the complaint does not amount to confiscation as charged.

Conclusion

The report of the Commission is sound in law. Its factual findings have substantial support on the record considered as a whole. Cf. Universal Camera Corporation v. Labor Board, 340 U. S. 474; Labor Board v. Pittsburgh Steamship Co., 340 U. S. 498. Its position is neither arbitrary nor in disregard of due process. Its orders reversing its prior order in this matter and denying reargument will be affirmed.

Findings of fact and conclusions of law are filed herein in accordance with the provisions of Rule 52, Federal Rules of Civil Procedure.

Findings of Fact

We find as facts:

1. On July 3, 1944 the Trustees of The Central Railroad Company of New Jersey filed a complaint with the Interstate Commerce Commission against all of the connecting railroad carriers operating in Official Territory and participating with the plaintiff in joint rates between New York Harbor and other points in and beyond said territory.

2. Said complaint alleged that the New York Harbor allowances were inadequate, unjust, unreasonable and inequitable, and unduly prejudicial to the Central Railroad of New Jersey in violation of Section 1(4) and Section 3(4) of the Interstate Commerce Act.

3. The complaint further charged that the practice of the other New York Harbor lines in agreeing to the maintenance of non-compensatory harbor allowances was an unjust and unreasonable practice in violation of Section 1(6) of the Act.

4. The evidence in the matter was heard by two examiners

on behalf of the Commission and was concluded in September 1946. The case was submitted to the Commission April 21, 1948 and the Report of the Commission was filed October 11, 1948.

5. In that Report the Commission found that the New York Harbor allowances to the Jersey Central out of the joint rates "* * * for the future will be unjust, unreasonable, and inequitable." The allowances for car floatage were increased to six cents per hundred pounds and for lighterage were increased on a sliding scale from six to eleven cents per hundred pounds. These allowances were to be increased proportionately with certain subsequent rate increases.

6. The increases were made applicable to all New York Harbor lines.

7. The Jersey Central allowances for car floatage and lighterage were not to be adjusted retroactively.

8. An appropriate order was entered by the Commission on the same date that its Report was filed, namely, October 11, 1948.

9. On December 10, 1948 a petition for reargument and reconsideration was filed by certain non-harbor lines and the New York Central Railroad Company. Plaintiff filed a motion to dismiss that petition.

10. The reargument was allowed and the case reargued on April 25, 1949.

11. Following reargument and reconsideration, the Commission, on December 29, 1949, filed a second report in the case. That report reversed the conclusions of the prior report and held that "Upon the record, we conclude that the allowances assailed have not been shown to have been or to be unjust, unreasonable, inequitable, or unduly prejudicial as alleged, and that the allegation of unlawfulness under section 1(6) of the act has not been sustained." On the same date, namely, December 29, 1949, the Commission entered an order setting aside its order of October 11, 1948 and dismissing the complaint in this cause.

12. Plaintiff then filed a petition requesting that the order of dismissal be set aside and that the case be again reopened for further consideration.

13. Said petition was denied by the Commission's order of May 18, 1950.

14. Plaintiff on January 29, 1951 filed its petition in this Court seeking to have set aside (1) the Commission's order of December 29, 1949 which, as stated, had reversed the Commission's first order in this case and (2) the Commission's order of May 18, 1950 which had denied plaintiff's petition that the case be reopened and reconsidered.

15. The United States of America and the Interstate Commerce Commission filed answers on April 4, 1951. The intervening railroad defendants filed an answer on April 5, 1951.

16. The matter was argued orally to this Court, convened pursuant to statute, on June 8, 1951 and briefs have been submitted.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter of this suit.

2. The Commission's orders of December 29, 1949 and May 18, 1950 were within the statutory authority of the Commission.

3. The findings of the Commission contained in its Report of December 29, 1949 are supported by substantial evidence on the record considered as a whole and are clearly sufficient to sustain its order of that date.

4. The order of the Commission of May 18, 1950 denying plaintiff's petition for reopening the case and reconsideration thereof was entirely proper and in accordance with the authority vested in the Commission by the Interstate Commerce Act.

5. The orders of the Commission of December 29, 1949 and May 18, 1950 should be affirmed.

APPENDIX B

The pertinent provisions of the Interstate Commerce Act, Title 49 USCA, are Sections 1(4), 1(6), 3(4), 15(1), 15(6), 15a(2) and National Transportation Policy, Note preceding Section 1.

Section 1(4) of the Act provides:

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor * * *; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1(6) provides:

"It is hereby made the duty of common carriers subject to the provisions of this part to establish, observe and enforce * * * just and reasonable regulations and practices affecting * * * all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property subject to the provisions of this part upon just and reasonable terms and every unjust and unreasonable classification, regulation or practice is prohibited and declared to be unlawful."

Section 3(4) provides:

"All carriers subject to the provisions of this part shall, according to their respective powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

Section 15(1) provides:

"That whenever * * * the Commission shall be of the opinion that any individual or joint rate, fare or charge whatsoever * * * or that any individual or joint classification, regulation or *practice* [19] whatso-

[19] Emphasis supplied.

> ever * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this part the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge * * * to be thereafter observed in such case, or the maximum or minimum or maximum and minimum to be charged and what individual or joint classification, regulation or *practice*[19] is or will be just, fair and reasonable to be thereafter followed * * *."

Prior to 1920, while it had been settled that railroad rates were "affected with a public interest," the view prevailed that divisions of joint rates between railroads were a private matter to be settled by private bargaining. As regulation developed, however, it became apparent that the efficiency and solvency of individual railroads, particularly terminal railroads like the Petitioner, might be more dependent on its divisions of joint rates than on the amount of the rates themselves. The result was that Congress in the 1920 Amendments to the Act imposed an affirmative duty on each railroad to establish "just, reasonable and equitable" divisions (Section 1(4) above) and then enacted Section 15(6), frequently referred to as the "Divisions Statute", which reads as follows,—

> "(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof

[19] Emphasis supplied.

are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and *the importance to the public of the transportation services of such carriers;* and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, *without regard to the mileage haul,* entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

Section 15a(2), as amended in 1940, provides:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

Congress in 1940 added to the Act the following definition of the National Transportation Policy:

"It is hereby declared to be the national transportation policy * * * to promote safe, adequate, eco-

nomical and efficient service and *foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation service, *without* unjust discriminations, undue preferences and advantages and unfair or *destructive competitive practices;* * * * all to the end of developing, coordinating and preserving a national transportation system * * * adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy'' (Title 49, U. S. C. A., note preceding Section 1).

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Office-Supreme Court, U.S.
FILED
DEC 29 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 506

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

AUGUSTUS C. STUDER, JR.,
THEODORE H. BURGESS,
PARKER FULTON,
LAWRENCE CHAFFEE,
KEMPER A. DOBBINS,
Counsel for Appellees.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 97-51

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Plaintiff, Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

Defendants, Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

This Statement and Motion in Opposition to the appellant's statement as to jurisdiction herein are filed on behalf of the thirty railroad companies named below in the footnote[1] as intervening defendants, appellees.

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[1] Akron, Canton & Youngstown Railroad Company.
Ann Arbor Railroad Company.
Bessemer and Lake Erie Railroad Company.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago, Indianapolis & Louisville Railway Company.
Chicago South Shore & South Bend Railroad.
Delaware & Hudson Railroad Corporation.
Detroit, Toledo & Ironton Railroad Company.
Detroit & Toledo Shore Line Railroad Company.
Grand Trunk Western Railroad Company.

The Opinion, Findings of Fact, and Conclusions of Law of the District Court are reported in *Central R. Co. of New Jersey* v. *United States*, 99 Fed. Supp. 564.

The railroad appellees in the above-entitled cause for their joint statement in opposition to the appellant's statement as to jurisdiction herein, and in support of their motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal -

The three broad or "major" legal questions which the appellant presents are set forth on pages 2 and 3 of its Jurisdictional Statement.[2] They concern alleged errors of the District Court in the following respects:

I. Failure to set aside the final orders of the Interstate Commerce Commission[3] for errors of law, lack of essential basic findings or lack of substantial evidence;

Lehigh & New England Railroad Company.
New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
Norfolk and Western Railway Company.
Pittsburgh & Lake Erie Railroad Company.
Pittsburgh and West Virginia Railway Company.
Reading Company.
Wabash Railroad Company.
Western Maryland Railway Company.
The Atchison, Topeka and Santa Fe Railway Company.
Chicago and North Western Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway.
Chicago, Milwaukee, St. Paul and Pacific Railroad.
Chicago, Rock Island and Pacific Railroad Company.
Gulf, Mobile and Ohio Railroad.
Illinois Central Railroad.
The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.

[2] The abbreviation "Jur. S." will be used sometimes hereafter to refer to the Jurisdictional Statement of the appellant.

[3] The Interstate Commerce Commission will hereafter sometimes be referred to as the "Commission."

II. Failure to weigh the evidence and arrive at an independent judgment on the issue of confiscation;
III. Failure to comply with the requirement of the Administrative Procedure Act.

Without encroaching on the District Court's opinion, appellees will first indicate preliminarily under Part II herein their general position regarding the questions presented. Under Part III appellees will discuss *Baltimore & Ohio R. R. Co.* v. *United States*, 298 U. S. 349, a construction of which is central to much of the appellant's argument, and in so doing answer several of the secondary arguments interspersed throughout the Jurisdictional Statement. The other contentions separately argued by appellant will be answered subsequently under more general headings.

II. No Substantial Federal Question Is Presented by Appellant's Jurisdictional Statement

The issues raised by appellant reflect the same basic contentions that were urged as part of appellant's case in two oral arguments before the entire Commission and also before the District Court. In two comprehensive reports the entire Commission considered these contentions at length after studying a massive record and long series of briefs. The District Court's opinion also bespeaks a painstaking, orderly and logical consideration of each of these contentions. Therefore the appellant's contentions have received the fullest consideration below. This case therefore represents the most obvious type of case to which the doctrine of administrative finality should be applied.

We further submit that the basic defect of appellant's case, as most clearly shown by the District Court, is its failure to establish proof requisite under the Interstate Commerce Act to justify the Commission in granting the relief it sought in its complaint. It is respectfully submitted

that appellant's arguments, led by a strained use of certain language taken from the *B. & O.* Case, 298 U. S. 349, cannot be used as a substitute for the deficiencies of proof in appellant's own case on matters that are fundamental to the exercise of the Commission's jurisdiction under Section 15(6) to prescribe the increases in the harbor allowances of the Jersey Central and the other New York harbor lines sought in the complaint. Appellant's arguments merely function to distract attention from this basic, simple issue in the case. The District Court and the Commission recognized the issue and dealt with it exhaustively and soundly on the facts and law.

III. The Commission's Decision Is in Strict Accordance With the Provisions of the Interstate Commerce Act, the Decisions of the Supreme Court and the Evidence.

A. THE APPELLANT'S CONTENTIONS

Appellant contends that the Commission and the District Court departed from a construction which appellant contends was placed upon the Interstate Commerce Act in *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, to the effect that in a divisions case, the Commission, in administering 49 U.S.C. Section 15(6), should proceed on the presumption that the rates to be divided were reasonable (Jur. S., p. 8). Two excerpts from the second report of the Commission are quoted by the appellant to illustrate this purported departure (Jur. S., p. 8). We indicate these excerpts, underscored, below in more liberal quotations from the second report so that the Court may note their significant relationship to failure of proof required of the appellant under Section 15(6). (276 I.C.C. 655, 658):

> "It is thus clear *that the great bulk of the New York rates, the divisions of which are here in issue, do not include the full cost of the lighterage and floatage serv-*

ices in New York Harbor which are performed under such rates. As indicated in the prior report, page 542, this fact does not preclude complainant from making harbor costs the primary issue. It does, however, preclude us from prescribing allowances for lighterage or floatage services as divisions of joint rates based primarily upon the cost of the harbor service alone, and without careful consideration of the cost of the line-haul and other services performed under such rates.

* * * * * * *

"Complainant's data purporting to show the costs of the nonharbor services performed under the joint rates were found in the prior report to be unacceptable. We affirm that finding, for the reasons given in that report, at pages 563-568. There are, therefore, upon this record no reliable cost data for measuring the justness and reasonableness of the harbor allowances by the divisions of the joint rates received by the connecting carriers. As stated under the preceding heading, *the joint rates, or at least most of them, do not include the full cost of the harbor services, and therefore, for the purposes of this proceeding, must be assumed to be below a maximum reasonable level.* Thus, cost data to be helpful in passing on the issues here, should show, not only the spread, if any, between the cost of and the revenue derived from one service by one carrier, but the costs and revenues from each of the services covered by the joint rate, or, at least costs which are shown to be typical of the services included in the rate. Such costs are not before us. Without such a showing it would be impracticable to determine the equitable share which any carrier should receive from the rate."[4] (Emphasis ours.)

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[4] It was further admitted by the Commission in its first report (272 I.C.C. 529 at 585): "The record does not afford an adequate basis for determination of the precise measure of the minimum joint rate that would be sufficiently high to warrant a deduction of the full amount of the harbor allowance found reasonable."

In support of the presumption which the Commission is allegedly required to make under 15(6), the appellant again urges (Jur. S., pp. 24-5), as it did before the Commission and the Court, the following expression from the *B. & O.* case (298 U. S. at 357):

> "In proceedings to determine and prescribe divisions the commission is governed by §§ 1(4), 15(6), 15a(2), U. S. C. A. title 49, §§ 1(4), 15(6), 15a(2); it is not required or authorized to investigate or determine whether the joint rates are reasonable or confiscatory. The question whether it complied with the requirements of the Act does not depend upon the level of the rates or the amounts of revenue to be divided. The purpose of the provisions just cited is to empower and require the commission to make divisions that colloquially may be said to be fair."

B. THE *B. & O.* CASE RECOGNIZES THE BROAD LATITUDE IN THE COMMISSION UNDER SECTION 15(6) TO CONSIDER FACTS RELEVANT TO PROPER EXERCISE OF ITS AUTHORITY THEREUNDER.

The above expression in the *B. & O.* case upon which appellant depends clearly was not intended to relieve the appellant or any party of essential proof under Section 15(6) of relative costs, service, and divisions of the carrier groups to be affected by the divisional realignment. In fact, the conclusion of the Commission is in strict accordance with this interpretation of the provisions of the Interstate Commerce Act relating to divisions and also with the interpretation of the Court in *Interstate Commerce Commission* v. *Hoboken R. R. Co.*, 320 U. S. 368, 378, to be mentioned presently. The Court in the *B. & O.* case said:

> "In substance, Congress by that paragraph (Section 15(6)) authorizes the commission to take into account *all that is relevant* to the ascertainment of fair divisions." (Parentheses and emphasis ours.) (358-359)
>
> "The commission alone is authorized to decide upon

weight of evidence or significance of facts. There is *no single test* by which 'just', 'reasonable' or 'equitable' divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what division will conform to these standards. *Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases*" (359). "* * * the commission's findings based on evidence *and its determination as to the significance of pertinent facts found are conclusive*" (362). (Emphasis ours.)

The *B. & O.* case recognized that one factor which the Commission might consider as relevant is the fairness of a prescribed division in relation to its effect upon a carrier's connections participating in the joint rates to be divided. Under Section 15(6), the Court held that the Commission could grant a larger division to a railroad under certain circumstances "provided the share left to its connections is 'adequate to avoid a confiscatory result' " (370). See also to same effect *United States* v. *Abilene & S. R. Co.*, 265 U. S. 275, 285.)

The basic concept just mentioned was also recognized in the opinion in the *B. & O.* case of Justice Brandeis (joined in by Justices Stone, Roberts and Cardozo), concurring in the Court's result, wherein it was said (383-384):

"The Commission's task is solely to make a fair division of existing rates. A division, although fair, may conceivably fail to give any of the connecting carriers adequate compensation for the service rendered, *because the through rate—the thing to be divided—is itself inadequate.* Or conceivably, the through rate may be so generous that all participants will receive compensatory divisions, although, as between themselves, the division itself is unfair. The fact that the share assigned to one is noncompensatory will be of evidential value *if accompanied by evidence that some*

other carrier is receiving better treatment. But, unless it appears that some other carrier was so favored, the non-compensatory character of the division would be entirely immaterial. And even when relevant, may be of little or no weight because of other considerations.

"At best, the non-compensatory character of the share, if proved, would be only one of the many subsidiary evidential facts which Congress, by § 15(6), has commanded the Commission to take into consideration in determining what a fair division is." (Emphasis ours.)

If the language of the Court at page 357 of the *B. & O* case (quoted above at page 6 of this reply), in the light of its entire decision, is given a sensible and realistic interpretation, we find it is in complete harmony with the basic concepts just mentioned for it is apparent that the Supreme Court in the quoted language merely observed that the Commission was not required or authorized in a divisions case to make adjudications for rate purposes with respect to the rates being divided. The Court certainly did not mean that the Commission in a case involving the broad issues of a divisions case (See Section 15(6)) was to forget the existence of the rates; otherwise what would the Commission divide? That the appellant does not seriously contend the rates must be disregarded is evident from appellant's consistent use throughout this litigation of rate material to advance affirmatively its own contentions, as illustrated by the summarization in pages 4-6 of its Jurisdictional Statement. Neither did the Supreme Court state that the rates must be presumed reasonable. It is one thing to say the rates are not in issue, and another to say that the Commission cannot consider the amount of the rate in dividing it.

As the Court said in the *B. & O.* case (p. 357), the purpose of the statutory provisions "is to empower and require the commission to make divisions that colloquially may be said

to be fair." To determine whether the division of one participating carrier is "fair", or to fix a "fair" division for one participating carrier, the relation of such carrier's service to the total service of all of the carriers participating in the joint rate must be known.

C. APPELLANT'S STRAINED USE OF QUOTED EXTRACT FROM THE *B. & O.* CASE IGNORES THE FACTS OF THAT CASE AS OPPOSED TO FACTS OF PRESENT CASE AND IS INCONSISTENT WITH APPELLANT'S CASE BEFORE THE COMMISSION.

The presumption which appellant would create for universal application in divisions cases as a restriction upon the facts which the Commission should consider in such cases, by its arbitrary use of the quoted excerpt from the *B. & O.* case and similar expression elsewhere[5] ignores this fact: In the cases involving these expressions one underlying factor among others was that there was no contention that the rates therein involved did not produce revenue sufficient to cover the full cost of all of the services required to be performed under them (*B. & O.* case, p. 356; *Hoboken* case, p. 379). In the *B. & O.* case (p. 369), both groups of carriers "virtually conceded" the joint rates "adequate for all purposes." In other words, the Commission and the Court in both the *B. & O.* and *Hoboken* cases assumed the reasonableness of the rates from the failure of the parties to question their adequacy, and not from the mandates of the Interstate Commerce Act. The appellant has patently and erroneously construed an inference which the Court reached from the conduct of the parties in the two cases cited as a general presumption of law that would act as a substitute for evidence. The very fact that reference is made in these cases to the silence or attitudes of the parties as the basis for the assumption of

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[5] *I.C.C.* v. *Hoboken R. R. Co.*, 320 U.S. 368, 379.

reasonableness shows that what is involved is an inference rather than a presumption. Here, in contrast, a contention was made to the effect that the joint rates to New York did not include the full excess cost of the harbor service and this was found to be a fact by the Commission on the basis of substantial evidence and prior decisions of the Commission. When the Jersey Central fell back upon its demand for an allowance which would fully cover the alleged excess cost of the harbor service in lieu of its original claim, exemplified by its equated mileage formula, for an allowance for the harbor service in the form of a percentage division equivalent to the relation of the alleged excess cost of the harbor service to the alleged cost of the total service performed under the joint rate, it made significant the level of the rates or the amount of revenue to be divided. If the rates do not contain compensation for the excess cost of the harbor service, acceptance of the Jersey Central's claim obviously would leave revenue insufficient to provide full compensation for the balance of the through service and accordingly would result in unjust and unfair divisions.

The conclusion of the Commission in its second report, set forth under Part III A, *supra*, which is again repeated in substance on page 661 of 276 I. C. C. also conforms to the theory of complainant's case as it was originally conceived and propounded by its formula for distributing the revenues under the joint rates in relation to the costs of the several services. Appellant's counsel stated on the first oral argument before the Commission:

> "The theory of complainant's case, as it was presented, I think, should be outlined in order to make a clear background for both report and subsequent developments. The entire case was presented on the theory that there should be a division of the revenue in proportion to the respective costs of the harbor lines on the one hand, and of the line-haul carriers on the other hand." (Rec. p. 1491)

It also conforms to the finding in the first report where it is stated with respect to complainant's formula (272 I. C. C. at pp. 566-567):

> "Nevertheless, the average cost of some carrier group must be used, if complainant's formula is to be made workable. The ideal average would be that of all carriers which participate in the joint rates on interline harbor traffic. These are the carriers operating as previously stated, in the Great Lakes and central eastern regions, which do not include New England. A study of all lines operating in these two regions, of the kind made by the five carriers selected by complainant, would be a difficult task. However, a study covering at least a representative cross-section of these carriers would be essential to the determination of average costs which could reasonably be accepted as reflective of average conditions in the two regions."

Under the circumstances it was the primary obligation of the Commission to determine the allowances for the harbor service of the Jersey Central on the basis of the amount and cost of that service as related to the amounts and costs of the other services performed under the joint rates. The burden of proof was upon the Jersey Central in the proceeding before the Commission to supply the evidence to permit the Commission to act. It attempted to do so through the formula which was rejected. Therefore, the Commission perforce had to dismiss the Jersey Central's complaint.

D. DECISIONS OF COMMISSION AND DISTRICT COURT ARE ALSO IN STRICT ACCORDANCE WITH SECTION 15(6) OF INTERSTATE COMMERCE ACT.

While it has been said that there is no single, controlling measure of a lawful division, the decisions of the Courts and the Commission point to the proposition (supporting the Commission's conclusion herein), as stated in the *Hoboken* case (p. 378) with the *B. & O.* and other cases cited as authority, that

> "the measure of the carrier's participation in (or contribution to) the joint transportation service is the measure of its divisions of the joint transportation charges." (Parenthetical statement ours.)

In *New England Divisions*, 66 I. C. C. 196, 198, the Commission stated:

> "* * * a paramount consideration in determining the equitable share of the joint revenue which any carrier shall receive must be the relative amount and cost of the service which it renders, * * *."

The other matters, or standards, set out in Section 15(6) are really factors which are required to be considered to determine whether, in a specific case, some deviation from the basic measure is justified. Thus, the greater revenue needs of the complaining carrier may in fairness entitle it to a share of the joint rate somewhat larger than the share of its contribution to the joint service; or the higher efficiency of one carrier may entitle it to a share of the joint rate somewhat larger than its contribution to the joint service measured by relative costs. *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 477; *New England Divisions* case (*Akron, C. & Y. R. Co.* v. *United States*), 261 U. S. 184, 194, 195. But the starting point, the fundamental measure, is the proportion of the total service represented by the service to which the division applies.

E. THE FINDING OF THE COMMISSION "THAT THE GREAT BULK OF THE NEW YORK RATES, THE DIVISIONS OF WHICH ARE HERE IN ISSUE, DO NOT INCLUDE THE FULL COST OF THE LIGHTERAGE AND FLOATAGE SERVICES IN NEW YORK HARBOR WHICH ARE PERFORMED UNDER SUCH RATES", IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The above-captioned finding by the Commission has major significance in this case. It is supported by decisions of the Commission in other proceedings, by strong evidence

below, and by admissions of the appellant, as indicated in the District Court's opinion (99 F. Supp. 564, 567-568).

The two decisions of the Commission which support the finding of the Commission are the *New York Harbor Case*, 47 I.C.C. 643, and *Eastern Class Rate Investigation*, 164 I.C.C. 314. At pages 707-708 of the first decision it was held that there was no allowance in the rates as then in effect for the excess cost of the harbor service over and above the cost of making rail deliveries in northern New Jersey. Appellant criticizes the effect of the finding in that case as antiquated. However, the same conclusion was reached by the Commission in the second case referred to,—one which is not criticized by the appellant in its Jurisdictional Statement. In that case the Commission held that the addition of 10 miles to the distances to the water front terminals in connection with the rates for long hauls was not proposed—

> "as constructive mileage in the sense that it represents an attempt to translate the cost of an unusual transportation service into terms of miles under a distance-rate scale. The evidence of terminal costs of the trunk lines at New York in this record is extremely fragmentary and insufficient to serve as a basis for even an approximate conclusion. Respondents have proposed the 10-mile addition with a view to arriving at fair common distances on which to base group rates * * *." (p. 435)

And at page 447 it is said:

> "Furthermore, as before pointed out, the addition of the 10 miles at New York is approved not as a measure of the cost of water-borne traffic in New York Harbor but merely a device for securing representative group distances."

Furthermore, it was stated by the Commission in the first report in this proceeding, 272 I.C.C. 529, at 585:

> "Manifestly, the cost of the lighterage service, as a part of some of the lower rates, cannot be given full

recognition. Complainant concedes that allowances based on costs developed from the study of the Jersey Central would approximate, or exceed, the entire amount of the joint rate in some instances, and leave to connecting lines an obviously inadequate rail division in others. One of the purposes of the sliding scale of percentage deductions, in the original proposal of complainant at the hearing, was to afford some measure of relief in such situations."

This first report is approved by appellant.

IV. The Commission Did Not Err in Failing to Find that the Maintenance of the Present Harbor Allowance Is an Unlawful Practice, in Violation of Section 1(6) of the Act.

It was settled by the Supreme Court in *Baltimore & Ohio* v. *U. S.*, 277 U. S. 291, that divisional arrangements under joint rates are not a practice, and even if they could be so considered, the same kind of evidence would have to be offered as in any divisional case under Section 15(6) of the Act.

Appellant endeavors to distinguish the *B. & O.* Case on the ground that the "controlling point" in the *B. & O.* Case was that "the issue there was between the complainants and their *connecting carriers*, * * * whereas here the complaint is against *competing* carriers."

The holding of the Court in the *B. & O.* Case was not predicated on the descriptive term "connecting carriers"—which term was obviously used with reference to the factual situation before the Court (277 U. S. at 300). The moving considerations behind the Court's holding that divisional arrangements under joint rates are not a "practice" within the meaning of the Act were:

(1) The divisional nature of the controversy. The Court said (p. 299): "* * * It results that the controversy be-

fore the Commission involved *divisions or apportionments of revenues* derived from through traffic." (Emphasis supplied.)

(2) The sound rule of construction that Section 15(6) empowering the Commission to prescribe *divisions of joint rates* "may not be *avoided* by a broad construction of the word 'practice'." (Emphasis supplied.) (300)

There is nothing in this broad basis for the Supreme Court's holding that justifies making its application turn on specific types of divisions controversies and the chance situations as to geography and location of junction points in a particular case.

Going beyond the *B. & O.* Case, the District Court makes clear the lack of evidentiary support for the appellant's complaint as to the alleged "unlawful practice." (99 F. Supp. 564 at 573).

V. The District Court Made a Proper Review of the Evidence and Sufficient Findings of Fact

Appellant alleges that the District Court's opinion did not refer to the findings made by the two Examiners that heard the case, nor the reasoning of the first report of the Commission, nor to the dissenting opinion attached to the second report. In this respect the opinion is alleged to be contrary to *Universal Camera Corp.* v. *Labor Board*, 340 U. S. at 488, construing the Administrative Procedure Act. (Jur. S., pp. 21-23.)

In the *Universal Camera* Case the Court said in connection with the Administrative Procedure Act (488):

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. *Nor was it intended to negative the function of the Labor Board as one of*

> *those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views,* even though the court would justifiably have made a different choice had the matter been before it *de novo.* Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it *cannot conscientiously find that the evidence supporting that decision is substantial,* when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." (Emphasis ours.)

No one, we submit, could seriously contend that the reviewing court in this case could not conscientiously find "substantial evidence" supporting the Commission's decision. The District Court's detailed opinion discussing the evidence disproves this. The Court did in fact have in mind the last-cited Act and decision for it includes the first report of the Commission specifically in its over-all discussion of the opposing views and concludes (99 F. Supp. 564 at 575):

> "The report of the Commission is sound in law. Its factual findings have substantial support on the record considered as a whole. *Cf. Universal Camera Corporation* v. *National Labor Relations Board,* 340 U.S. 474 * * *."

As the appellant admits (Jur. S., pp. 21-22) and the District Court's opinion shows, the Court has considered in order the various contentions of the appellant. These contentions in substance reflect and repeat in detail the points treated in the Examiners' proposed report and the other documents to which appellant refers.

Appellant's contentions also overlook the following principles:

(1) The consistency or inconsistency of the decisions of the Interstate Commerce Commission are not a concern of the District Court, and if the Commission's final report and the two orders attacked by the appellant are proper the Court should not be concerned with the prior report and order. *Virginian Ry.* v. *U. S.*, 272 U.S. 658, 663; 71 L. ed. 463, 467; *Georgia Pub. Serv. Comm.* v. *U. S.*, 283 U.S. 765, 775; 75 L. ed. 1397, 1405-6; *Western Paper Makers' Chem. Co.* v. *U. S.*, 271 U.S. 268, 271; 70 L. ed. 941, 942-3; *Boudurant* v. *U. S.*, 50 Fed. Supp. 701; *Watson Bros. Trans. Co.* v. *U. S.*, 59 Fed. Supp. 762; *Lang Transportation Corp.* v. *U. S.*, 75 Fed. Supp. 915 at 925.

(2) The legal effect of the challenged report, 276 I.C.C. 655, and the two orders of the Interstate Commerce Commission is the same as if they were supported by all members of that Commission. *Baltimore & Ohio R. R. Co.* v. *U. S.*, 298 U.S. 347 at 362.

It is also contended by appellant that there was "no indication" that the Court had itself examined the evidence as to appellant's harbor cost and that the Court's treatment of the evidence on the cost question falls short of the "independent findings of fact" which appellant alleges that a reviewing court must make when confiscation is charged. In support of this contention the appellant cites *St. Joseph Stockyards Co.* v. *U. S.*, 298 U.S. 38 at 51-54.

In analyzing the appellant's contentions on the subject of "confiscation" and the lack of evidence thereon, it is obvious that the Court did make an independent analysis of the pertinent factors, and reach independent conclusions and findings thereon, as witnessed among other things by appellant's own extracts from the Court's opinion (Jur. S., pp. 18-19). Hence the *St. Joseph Stockyards* Case does not

support the appellant. In that case the Court said (298 U.S. at 53):

> "* * * We have said that 'in a question of rate-making there is *a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing.*' *Darnell* v. *Edwards*, 244 U.S. 564, 569, 61 L. ed. 1317, 1321, 37 S. Ct. 701, P.U.R. 1917F, 64. The established principle which guides the court in the exercise of its judgment on the entire case is that *the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established.*" (Emphasis ours.)

The District Court's opinion makes it clear that appellant completely failed to support by evidence the proposition that the total divisions received by the Jersey Central and the other harbor lines are confiscatory. (99 F. Supp. 564 at 575). An essential finding without evidence to support it would be arbitrary. *Morgan* v. *U. S.*, 298 U.S. 468 at 480.

In this case the only evidence we have as to excess cost of the harbor service is that of the Jersey Central for the year 1939, which was five years prior to the filing of the complaint with the Interstate Commerce Commission, seven years prior to the hearing of evidence, and more than eleven years prior to the filing of the petition in this action.

In the *B. & O.* Case, 298 U.S. 349, it was held at pages 379-381 that cost evidence in the test period of 1928-1929, which ended more than one year before the first complaint to the Interstate Commerce Commission, four years before the final decision of that Commission and the commencement of the action in the three-judge court to enjoin the Commission's order, five years before the entry of the

court decree by the three-judge court, and six years before the submission of the case on appeal to the Supreme Court, was too remote to establish confiscation.

In the *B. & O.* Case, 298 U. S. 349, 379-380, the Court said:

> "Appellants should have brought forward evidence and estimates based on operations subsequent to the complaint, November 22, 1930, and also as near as possible to the time of trial in the district court. The order prescribing the challenged division has been in effect for a long time and *in the absence of proof clearly showing that on the basis of present and prospective conditions it is confiscatory, its enforcement ought not to be enjoined.*" (Emphasis supplied.)

Furthermore, even if confiscation so far as the Jersey Central is concerned could be proved on this record, which is denied, the Jersey Central claims that it could not operate if it received higher allowances for the harbor services than those received by the other New York Harbor lines. There is no issue of confiscation presented as to the other New York Harbor lines. (See *Gardner* v. *U. S.*, 67 F. Supp. 230 at 235.)

In connection with its "Fifth Amendment" argument, the appellant relies on *Southern R. R. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, as holding a railroad is entitled to receive compensation and profit for an additional terminal service even though it receives other compensation. The case does not hold to that effect but only that a reconsignment charge should include cost and some profit. It was stressed that such service was not a part of the transportation, but was only a special privilege which a shipper could not demand as of right except to avoid discrimination. In the instant case the harbor allowances are not separate charges published by the harbor lines and paid by the shipper. They are rather amounts deducted from the joint rates before prorating the re-

mainder among the line-haul carriers, including the harbor carrier that performs the harbor service as part of its line haul.

VI. Conclusion

Appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the District Court be affirmed.

McCarter, English & Studer,

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